

2000

Melvin Spears, Sandy Spears, Freddie Martinez,
Karen Martinez, Cliff Ruben, Tonja Ruben, Wayne
D. Lewis, Miriam Lewis, Heidi Thomas, and Wayne
V. Reynolds v. Edward C. Warr, Hazel V. Warr : Brief
of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

MELVIN SPEARS, SANDY SPEARS,
FREDDIE MARTINEZ, KAREN
MARTINEZ, CLIFF RUBEN, TONJA
RUBEN, WAYNE D. LEWIS, MIRIAM
LEWIS, HEIDI THOMAS and WAYNE
V. REYNOLDS,

Supreme Court No. 20000435-SC

Priority No. 15

Plaintiffs/Appellees,

VS.

EDWARD C. WARR and HAZEL V.
WARR,

Defendants/Appellants.

BRIEF OF APPELLEES

**Appeal from the Ruling of the Third District Court, Tooele County
Judge David S. Young**

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Marci Rechtenbach (USB #8146)
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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
DETERMINATIVE STATUTES	1
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Course of Proceedings	3
STATEMENT OF THE RELEVANT FACTS	5
SUMMARY OF THE ARGUMENT	19
ARGUMENT	22
I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF MERGER	22
II. THE PAROL EVIDENCE RULE DOES NOT BAR PLAINTIFFS' CLAIMS	25
III. PLAINTIFFS' CLAIMS ARE NOT PRECLUDED BY THE STATUTE OF FRAUDS	27
A. Hazel Warr Is Liable to Plaintiffs Under Principles of Agency and Estoppel.	32
1. Clayton Warr and Howard Warr were agents of Hazel Warr	33

2.	Because of her actions, Hazel Warr is estopped from arguing that she is not bound by promises made to the Plaintiffs by Clayton Warr	34
IV.	PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS	35
1.	The Statute of Limitations was Tolloed by the Warrs' Misleading Conduct	35
2.	The Statute of Limitations was Tolloed Under the Exceptional Circumstances Exception	38
V.	PLAINTIFFS WAYNE D. LEWIS AND MIRIAM LEWIS SUCCEEDED TO THE CLAIMS OF HOWARD A. CRITTENDEN AND LORA LEE CRITTENDEN.....	39
VI.	THE JUDGMENT DOES NOT REQUIRE DEFENDANTS TO CONVEY AN EXCESSIVE AMOUNT OF WATER.....	40
	CONCLUSION	41

TABLE OF AUTHORITIES

STATE CASES

<i>Badger v. Brooklyn Canal Company</i> , 966 P.2d 844 (Utah 1998)	22
<i>Bullfrog Marina, Inc. v. Lentz</i> , 501 P.2d 266 (Utah 1972)	26
<i>Colonial Leasing Co. v. Larsen Brothers Construction</i> , 731 P.2d 483 (Utah 1986)	26
<i>Dansie v. Hi-Country Estates Homeowners</i> , 987 P.2d 30 (Utah 1999)	23, 24
<i>Envirotech Corp. v. Callahan</i> , 872 P.2d 487 (Utah App. 1994)	36
<i>Hart v. Salt Lake County Comm'n.</i> , 945 P.2d 125 (Utah App. 1997)	22
<i>Martin v. Scholl</i> , 678 P.2d 274 (Utah 1983)	27, 28, 29
<i>Myers v. McDonald</i> , 635 P.2d 84 (Utah 1981)	36
<i>Newmeyer v. Newmeyer</i> , 745 P.2d 1276, 1278 (Utah 1987)	32
<i>Ravarino v. Price</i> , 260 P.2d 570 (Utah 1953)	27
<i>Rice v. Granite School Dist.</i> , 456 P.2d 159 (Utah 1969)	36
<i>Richardson v. Schaub</i> , 796 P.2d 1304, 1310 (Wyo. 1990)	30
<i>Roth v. Roth</i> , 269 P.2d 278 (Utah 1954)	29
<i>Sampson v. Richins</i> , 770 P.2d 998 (Utah 1989)	32, 35
<i>Secor v. Knight</i> , 716 P.2d 790 (Utah 1986)	24
<i>Stubbs v. Hemmert</i> , 567 P.2d 168 (Utah 1977)	23, 24
<i>Union Bank v. Swenson</i> , 707 P.2d 663 (Utah 1985)	25
<i>Vincent v. Salt Lake County</i> , 583 P.2d 105, 107 (Utah 1978)	36

<i>Warren v. Provo City</i> , 838 P.2d 1125 (Utah 1992)	36, 38
<i>Welchman v. Wood</i> , 337 P.2d 410 (Utah 1959)	27
<i>Wilde v. Wilde</i> , 969 P.2d 438 (Utah App. 1998)	35

STATUTES

Utah Code Ann. § 25-1-1	27
Utah Code Ann. § 25-5-1	1
Utah Code Ann. § 78-12-25	1
Utah Rule of Appellate Procedure 24(9)	31

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over this case pursuant to Section 78-2-2(3)(j) of the Utah Code.

DETERMINATIVE STATUTES

Utah Code Ann. § 25-5-1.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

Utah Code Ann. § 78-12-25

An action may be brought within four years:

- (1) upon a contract, obligation, or liability not founded upon an instrument in writing; . . .
- (2) for relief not otherwise provided for by law.

STATEMENT OF THE CASE

A. Nature of the Case.

The Plaintiffs and Appellees in this action are owners of five-acre lots in the Rocky Top Subdivision in Erda, Tooele County, Utah. With one exception, the Plaintiffs purchased their lots from the Defendants and Appellants, Edward Clayton Warr and Hazel Warr (the "Warrs").¹ The Warrs had advertised the availability of the lots through

¹ Plaintiffs Wayne D. Lewis and Miriam Lewis purchased their property in 1997 from Howard A. Crittenden and Lora Lee Crittenden Trial Exh. 119. The Crittendens purchased the property from the Warrs. (Trial Exh. 34). The Lewises have received a quit

newspaper advertisements and signs announcing the availability of “five-acre ranchettes, water, utilities . . .” Trial Exh. 60. In their sales pitch to Plaintiffs, the Warrs represented that, with the purchase of each lot, water sufficient to irrigate five acres would be provided and delivered to the Subdivision from the Rose Spring, in which the Warrs had an ownership interest. A pipeline from the spring to the Subdivision was already in place, but was in poor repair.

Although the deeds to the lots did not convey the water rights, the Warrs repeatedly acknowledged their obligation to provide the water and deliver it to the Subdivision, and assured the Plaintiffs that they would do so as soon as it became possible.² However, various problems (discussed more fully below), prevented the Warrs from delivering the water for a number of years after the lots were sold. *Id.* See also R. 954 at 103.

In reliance on the Warrs’ representations, the Plaintiffs purchased the lots, built family homes on them, and made valuable improvements to the land. In addition, several Plaintiffs participated, both financially and physically, in the installation of a distribution pipeline to deliver the water to their respective lots. They did so with the

claim deed from the Crittendens, entitling them to all of the Crittendens’ “right, title, and interest in any and all water or water rights associated with” Lot 10 of the Rocky Top Subdivision. Trial Exh. 131.

² Indeed, Plaintiff Wayne Reynolds was reassured by the Warrs at the closing on his property that, notwithstanding the content of the deed, the water would be conveyed and delivered as soon as certain obstacles were resolved. R. 954 at 50.

understanding that they already owned the rights to the water. Thereafter, however, instead of conveying or providing the water as represented, the Warrs approached certain Plaintiffs in late 1995, offering to sell them quit claim deeds to the water rights for \$2,500-\$5,000. Plaintiffs, knowing that they had already purchased the water, refused to pay the additional money. To date, the Warrs have failed to deliver the water from Rose Spring as promised, or to convey the water rights, leaving the Plaintiffs with no choice but to seek judicial relief.

B. Course of Proceedings.

Plaintiffs filed their Complaint in this action on January 28, 1999. R. 1-41. The Warrs filed a motion to dismiss based on arguments under the statute of frauds and statute of limitations. The motion was denied. The Warrs later moved for summary judgment under the same theories. That motion was also denied. R. 72-96, 197-98, 233-449, 583. The matter was tried to the Honorable David S. Young on March 13-15, 2000. In their Trial Brief and at the beginning of the trial, the Warrs moved to exclude all evidence that contradicted the terms of the written deeds to the lots. They did so only on the basis of the parol evidence rule.³ Judge Young denied that motion. R. 953 at 7. At

³ The Warrs have indicated that they moved to exclude such evidence at the beginning of trial under the doctrine of merger and the parol evidence rule. Appellant's Brief at 5. The Plaintiffs respectfully submit that the record shows that the motion was based only on the parol evidence rule. R. 953 at 6-7. The Warrs' trial brief never mentioned the doctrine of merger, nor did the pretrial order. Moreover, the transcript pages the Warrs cite state only the following on the issue:

the conclusion of trial, the court found for Plaintiffs and against the Warrs, and ordered that the Warrs convey to the Plaintiffs sufficient water to irrigate their properties as established by the evidence. R. 955 at 146-150. Plaintiffs, as directed by the court, prepared Findings of Fact, Conclusions of Law, and Judgment. R. 918-937. The Defendants objected to the proposed Judgment on the basis that the Judgment required the Warrs to convey an excessive amount of water, but their objections were denied by Judge Young, who signed the Judgment on April 24, 2000. R. 854-913, 916-37. The Warrs thereafter filed this appeal.

MS. DRAGOO: Your Honor, we had one other preliminary matter.

THE COURT: Yes.

MS. DRAGOO: That involves the basis. The case in chief is based on oral evidence, and the best evidence in the record right now are warranty deeds. And under the parol evidence rule, before the court can consider the parol evidence that would be in the case in chief of the plaintiff, you must make a finding that the warranty deeds were not in integration of the parties; and secondly, that the warranty deeds are somehow ambiguous. And so we would continue to make that objection.

THE COURT: That objection may be reserved for the record. I don't have any objection to having that a continuing objection throughout the course of the trial. I think it's going to be important for me to hear, and I have had preliminary motions that have caused me to believe I needed to hear the witnesses.

MS. DRAGOO: Thank you, your Honor.

R. 963 at 6-7.

STATEMENT OF THE RELEVANT FACTS

The following facts were established by the evidence at trial, in the record, and by stipulation of the parties:⁴

1. In or about 1983, the Warrs purchased from Terracor approximately 110 acres of real property, located in Tooele County, which property was subsequently subdivided into five-acre residential lots, known collectively as the Rocky Top Subdivision (the "Subdivision"). Trial Exh. 1, 2, 11, 17.

2. In conjunction with the acquisition of this real property, the Warrs also acquired from Terracor a 40% interest in rights in certain water originating at a spring located approximately one mile from the Subdivision, known as "Rose Spring" or "Bryan Springs." *Id.* There was an existing pipeline that ran from the spring to the Subdivision. R. 809.

3. To facilitate this development, on October 11, 1983, the Warrs filed with the Office of the Utah State Engineer (the "State Engineer") an application to change the place of use of the Water (1.0 cubic foot per second) to the Subdivision. Trial Exh. 3.

4. On November 2, 1984, the State Engineer approved Change Application No. 1-12993, thereby approving the use of the water for the irrigation of the Subdivision. Trial Exh. 7. The Warrs were given until October 31, 1988 to put the water to beneficial use. *See Id.*

⁴ As discussed in more detail below, the Warrs' statement of facts is taken almost entirely from the uncontested facts in the pretrial order which, of course, does not reflect the evidence determinative of the contested facts. Defendants have, therefore, utterly failed to marshal the evidence as is required.

5. In November, 1984, the Warrs presented their proposal for developing the Rocky Top Subdivision to the Tooele County Planning Commission. Trial Exh. 11. In their presentation, the Warrs indicated that they intended to use the water for irrigation of the proposed Subdivision. Trial Exh. 13.

6. Thereafter, the Warrs commenced the advertisement and sale of five-acre lots in the Subdivision. Certain newspaper advertising announced the sale of “five-acre ranchettes, water, utilities . . .” Trial Exh. 60.

7. The Warrs sold some of the lots to their children. In 1985, the Warrs conveyed Lots 4 and 5 of the Rocky Top Subdivision to their daughters and sons-in-law, James and Brenda Baldwin and Cecil and Teresa Jones, respectively. The Warranty Deeds that conveyed Lots 4 and 5 did not convey water rights. Trial Exh. 18, 19. In 1986, the Warrs conveyed Lot 3 of the Rocky Top Subdivision to their son, Howard Warr, and his wife, Linda Warr. The Warranty Deed that conveyed Lot 3 did not convey water rights. Trial Exh. 29. In 1988, the Warrs conveyed Lot 7 of the Rocky Top Subdivision to their daughter, Cathy Warr Johnson. The Warranty Deed that conveyed Lot 7 did not mention water rights. Trial Exh. 16. Finally, in 1991, the Warrs conveyed Lot 11 of the Rocky Top Subdivision to their son, Edward Kyler Warr and his wife, Lisa G. Warr. The Warranty Deed that conveyed Lot 11 did not mention water rights. Trial Exh. 68.

8. The Warrs verbally represented to Plaintiffs that, although they would need to obtain a permit to drill a well for culinary water, rights to water sufficient to irrigate

five acres would be included in the purchase of the lots, and that this water would be delivered from the Rose Spring to the Subdivision through an existing pipeline by gravitational flow. R. 661; R. 953 at 42-43, 76, 91, 132-134, 157-158, 173-175, 195-196; R. 954 at 6-9, 18, 29-30, 46-47. In addition, the Warrs pointed out the Rose Spring to the buyers. R. 953 at 91.

9. Commencing in January, 1986 the Plaintiffs purchased five-acre lots in the Subdivision from the Warrs.⁵ Trial Exh. 24, 34, 43, 54, 56, 62, 75. In each case, the Plaintiffs (or with regard to the Lewises' claims, the prior lot owners, the Crittendens) were informed by the Warrs that the purchase price of the lot included rights to sufficient water, delivered, to irrigate their five-acre lots. R. 953 at 42-43, 76, 91, 132-134, 157-158, 173-175, 195-196; R. 954 at 6-9, 18, 29-30, 46-47.

10. In their dealings with Melvin and Sandra Spears, who purchased Lot 6 of the Rocky Top Subdivision in 1986, the Warrs stated that sufficient water to irrigate five acres would be provided and delivered as part of the purchase price of Lot 6. R. 934; R. 953 at 42, 76. The Warrs further indicated that the water would be delivered through the existing railroad pipeline to the Subdivision, and that a pipeline would need to be installed to deliver the water to the individual lots. R. 953 at 43. At the time that the Spears purchased the lot, the back of the lot was green and highly saturated, with irrigation water running on the lot. R. 953 at 44. The Spears drilled a culinary well and built their home on Lot 6. R. 953 at 49, 52. The culinary well provides water sufficient

⁵ Plaintiffs Wayne D. Lewis and Merriam Lewis purchased their lot in 1997 from the original purchasers, Howard A. Crittenden and Lora Lee Crittenden. Trial Exh. 119.

for their domestic needs and the irrigation of one quarter acre of land. R. 953 at 51. R. 934. The Warranty Deed that conveyed Lot 6 to the Spears did not mention water rights. Trial Exh. 21.

11. In their dealings with Howard and Lorelee Crittenden, who purchased Lot 10 of the Rocky Top Subdivision in 1987, the Warrs represented that sufficient irrigation water to irrigate five acres would be provided and delivered from the Rose Spring, and that the water was included in the price of the lot. R. 954 at 28-30. In addition, Clayton Warr showed Mr. Crittenden flowing water on the back of the lot. R. 954 at 29. The Crittendens drilled a culinary well and moved a mobile home onto Lot 10, where they lived until they sold the property to Wayne and Miriam Lewis in 1997. R. 954 at 19. The culinary well provided sufficient water for their domestic purposes, some stock watering, and the irrigation of one quarter acre of land. R. 671-672. The Warranty Deed that conveyed Lot 10 to the Crittendens did not mention water rights. Trial Exh. 34.

12. In their dealings with Wayne Reynolds, who purchased Lot 2 of the Rocky Top Subdivision in 1988, the Warrs represented that with the purchase of the lot, sufficient water to irrigate five acres would be provided and delivered from the Rose Spring. R. 954 at 45-47. The Warrs further stated that the water would be delivered to the Subdivision through the existing railroad pipeline, but that a pipeline would have to be installed to bring the water across Lot 2. R. 954 at 45-47. The Warranty Deed that conveyed Lot 2 to Mr. Reynolds did not mention water rights. Trial Exh. 43. At the closing on Lot 2, Hazel Warr informed him that, because of problems with Max

Bleazard, the Warrs could not convey and deliver the irrigation water at that time, but that eventually the water would be provided. R. 954 at 50.

13. After acquiring Lot 2, Mr. Reynolds did not immediately drill a culinary well, due to financial constraints. R. 954 at 55. In or around 1995, the State Engineer imposed a moratorium on new appropriations of water in the Erda area. R. 954 at 56-57. Mr. Reynolds was therefore prevented from drilling a culinary well on Lot 2. *Id.* With neither culinary nor irrigation water, Mr. Reynolds has been unable to use or sell his property. R. 954 at 55.

14. In their dealings with Clifford and Tonja Ruben, who purchased Lot 9 of the Rocky Top Subdivision in 1990, the Warrs represented that sufficient water to irrigate five acres would be provided and delivered with the purchase of lot. R. 953 at 91. At that time, some water was already being delivered to the lot by a pipeline from the Rose Spring. R. 953 at 92. The Warranty Deed that conveyed Lot 9 did not mention water rights. Trial Exh. 56. The Rubens drilled a culinary well and built a home on Lot 9. R. 953 at 98, 100. With their culinary well, the Rubens are able to do some stock watering and irrigate one quarter acre of land. R. 953 at 99.

15. In their dealings with Fred and Karen Martinez, who purchased Lot 1 of the Rocky Top Subdivision in 1990, the Warrs represented that, with the purchase price of the lot, water sufficient to irrigate five acres would be provided and delivered from the Rose Spring. R. 953 at 195. The Warrs stated that the water would be delivered to the Subdivision through the existing railroad pipeline, and that a line would be installed to

bring the water across the Lots. R. 953 at 195-196. The Warranty Deed that conveyed Lot 1 did not mention water rights. Trial Exh. 62 The Martinezes built their home on Lot 1. R. 954 at 13. With their culinary well, the Martinezes are able to irrigate one quarter acre of land. R. 953 at 204.

16. In their dealings with Gary and Heidi Jo Thomas, who purchased Lot 8 of the Rocky Top Subdivision in 1992, the Warrs represented that sufficient water to irrigate five acres would be provided and delivered from the Rose Spring as part of the purchase price of the lot, R. 953 at 173-174, and that the water would be provided once the dispute with Bleazard was settled. At the time of purchase, there was water on the back of Lot 8. Trial Exh. 75. The Warranty Deed that conveyed Lot 8 did not mention water rights. R. 953 at 180.

17. The Plaintiffs and the Crittendens purchased their lots with the intent of irrigating them. Fred and Karen Martinez wanted to grow alfalfa. R. 954 at 7. Clifford and Tonja Ruben also wanted to grow alfalfa. R. 756. Heidi Thomas had horses and wanted to grow hay. R. 953 at 169, 181. Wayne Reynolds planned to raise game birds on the property. R. 954 at 55. He knew he needed water. *Id.*

18. In the purchase of their lots, the Plaintiffs relied upon the Warrs' representations regarding the irrigation water. Every Plaintiff, as well as the Crittendens, testified that they would not have purchased the property absent the Warrs' representations regarding irrigation water. R. 953 at 46, 53-55, 79, 94, 119, 184, 199-200, 206; R. 954 14, 18, 30, 51-52, 55-56.

19. Representations and promises regarding the water were made, not just by Clayton Warr, but by Hazel Warr as well. R. 953 at 79-80, 195-196; R. 954 at 6-9, 27, 45-46, 50. Lorelee Critten testified that the Warrs acted as "more or less equal partners." R. 954 at 27.

20. In April, 1987 the Warrs were sued in the Third Judicial District Court of Tooele County, State of Utah, Civil No. 87-058 in an action challenging their ownership of the water. In defense of this claim, the Warrs filed an affidavit signed by both of them under oath. Trial Exh. 40. In relevant part, the affidavit states:

We filed Application No. a-12993 (15-3020) with the Utah State Engineer to change the point of diversion, place and nature of use of our 40% interest in Diligence Claims 1260 to facilitate the use of such water for irrigation, domestic, and stock watering uses on our property and on the Rocky Top Subdivision.

...

We subdivided and platted eleven five-acre parcels of our property within Section 26, Township 2 South, Range 4 West, Salt Lake Base & Meridian, Tooele County, Utah as the Rocky Top Subdivision, recorded August 30, 1985 at Book 232, Page 344, official records of the Tooele County Recorder.

We subdivided and platted the Rocky Top Subdivision with the intent of selling platted lots with water developed from our interest in the Rose Spring, in reliance on the State Engineer's Memorandum Decision of November 2, 1984.

We have sold six of the eleven lots in the Rocky Top Subdivision upon our representation that gravity flow Water would be provided to such lots from our interest in the Rose Spring.

Due to the pending quiet title action concerning the Rose Spring filed by Dale Max Bleazard, J.N. Ward Engineering has been unable to construct the planned metering and diversion system for the Rose Spring and we have been unable to provide gravity flow Water through such facilities to the Rocky Top Subdivision.

Id. When questioned about the affidavit at trial, Hazel Warr explained, “I suppose I’m perjured.” R. 954 at 95.

21. At the time that the Plaintiffs purchased their lots and repeatedly thereafter, the Warrs informed them that delivery of the water was being held up by the adverse claims to the water by Mr. Bleazard. R. 953 at 53, 101, 181, 202; R. 954 at 50. Certain of the Plaintiffs were also informed that certain improvements to the pipeline from the Rose Spring to the Subdivision had to be made in order to increase the flow of water for use by the lot owners. R. 953 at 53; R. 954 at 46-47. Later, they were assured that “Loveless is working on the deeds, and things should be taken care of really soon.” R. 953 at 183.

22. As noted above, the lot owners along the south side of the Subdivision were also told that a distribution line from the point at which the line from the spring entered the Subdivision to their lots would have to be installed. R. 954 at 46.

23. On June 17, 1988 the Warrs, through their attorney, Denise A. Dragoo, filed a written application with the State Engineer, signed under oath, seeking an extension of the time for filing proof of beneficial use of the water from October 31, 1988 to October 31, 1991. Trial Exh. 38. This extension was approved by the State Engineer. This application referenced the Warrs’ efforts to perform certain tasks necessary to deliver the water from the Rose Spring to the Subdivision. Trial Exh. 37.

24. In June of 1990, the Bleazard litigation against the Warrs was dismissed without prejudice. Trial Exh. 59. Thereafter, Bleazard continued to fight with the

Warrs over the use of the Rose Spring water, threatening further legal action until approximately 1993 or 1994. R. 954 at 115.

25. In the summer of 1991, the Warrs began the installation of a pipeline to distribute water from the railroad pipeline to the lots along the southern boundary of the Subdivision. R. 953 at 53-54, 199.

26. In reliance on the promises made by the Warrs, Wayne Reynolds, the Spears, and the Martinezes participated in the cost and physical installation of the water distribution line from the northeast corner of the Subdivision where the existing pipeline from the Rose Spring enters the Subdivision to their respective lots. R. 953 at 53-55, 199-200; R. 954 at 51-52. After this pipeline was installed, the amount of water deliverable to the Subdivision remained very limited by the capacity of the railroad pipeline. R. 668, 928.

27. On October 24, 1991, the Warrs filed and signed under oath a request for an additional extension of time for the filing of proof of beneficial use of the water from October 31, 1991 to October 31, 1993. Trial Exh. 71. In this request, the Warrs offered the following reason for an extension: "Work in progress on waterline. Work still to be done. I have spent approximately \$6,000 on waterlines and will spend \$4,000 more before completed." *Id.* A substantial portion of these funds were supplied by Plaintiffs. R. 953 at 53-55, 199-200; R. 954 at 51-52, 142-143. This request for an extension was granted, and the Warrs were given until October 31, 1994 to put the water to beneficial use. *Id.*

28. In 1993, Mr. Bleazard finally agreed to allow the Warrs to transfer the water rights into the Plaintiffs' wells. R. 954 at 103; R. 667. The Warrs, however, continued to provide excuses for their failure to convey the water rights and deliver the water. R. 953 at 53, 101, 173-175, 181, 202.

29. On July 12, 1994 the Warrs, without additional compensation, conveyed by quit-claim deed to their son Howard and his wife, who owned one of the lots in the Subdivision, rights to seven and one-half percent (7.5%) of their interest in the Water for the purpose of irrigating their son's five-acre lot. Trial Exh. 98; R. 954 at 145-146. Similar quit-claim deeds were given to the Warrs' other children who resided in the Subdivision, also without additional compensation.⁶ Trial Exh. 97; R. 954 at 145-146.

30. On September 12, 1994, the Warrs filed a request with the State Engineer for another extension of time for filing proof of beneficial use of the water from October 31, 1994 to October 31, 1996. Trial Exh. 100. In support of this request, the Warrs stated as follows: "Working on Water Line. Increase Water flow from 30 gallon minute to 60 gallon minute, which would be my 25 percent of Water Right." *Id.* This statement was in writing and signed under oath. The Warrs' request for an extension was granted by the State Engineer. *Id.*

31. At various times after purchasing their lots, Plaintiffs inquired as to why the water had not been delivered, and were repeatedly told that the water was tied up

⁶ Although Hazel Warr admitted at trial that her children who purchased lots in the Subdivision were told they would have irrigation water, the warranty deeds conveying the properties to her children are, like those given to the Plaintiffs, silent on the subject of irrigation water. R. 954 at 72; Trial Exh. 18, 19, 29.

because of Bleazard, or that the Warrs were working on the pipeline, or that the deeds were being prepared. R. 953 at 53, 58, 101, 181-182, 202. At all times prior to 1995, the Warrs continued to assure Plaintiffs that they would provide the water as soon as possible. R. 953 at 62, 181-182.

32. In or about 1995, the Warrs told their son, Howard Warr, that they had decided they were not going to convey to the Plaintiffs the promised water rights without the payment of additional money. R. 953 at 146. When Howard protested that the Plaintiffs had already paid for the water rights, the Warrs did not deny that the original deals had included water rights, and delivery of the water. Instead, as Howard testified: his father's comeback in all of it was "they have nothing in writing", R. 953 at 151, and his mother's was "bring on the lawyers." R. 953 at 156.

33. Thereafter, the Warrs began informing the Plaintiffs that quit-claim deeds had been prepared to convey the water rights as originally agreed. R. 953 at 59-61, 101-102, 183, 204-206; R. 954 at 18-19, 53-54. However, the Warrs now stated, for the first time, that the Plaintiffs would have to pay an additional \$2,500-\$5,000 per lot for the water rights, stating that they "had to make some money on this." *Id.*

34. The first set of quit claim deeds Mr. Loveless prepared at the Warrs' instruction, in the names of Plaintiffs and the Warrs' children, would have conveyed "Seven and nine tenths percent (7.9%) of [the Warrs' water right], which represents .079 cfs from Rose Spring AKA Bryan Springs." Trial Exh. 80, 81, 82, 83, 84, 85, 86, 87, 88. (A subsequent set of deeds was later prepared, cutting the amount of water to "Seven and

one half percent (7.5%) of [the Warrs' water right] . . . which equals a flow of .075 cfs in Rose Spring.” Trial Exh. 90, 92, 97, 98.)

35. Every Plaintiff who was approached (the Rubens were never approached by the Warrs, but learned from Heidi Thomas that the Warrs were attempting to sell the deeds for \$2500), as well as the Crittendens, refused to pay for the deeds, saying that they had already paid for the water rights with the purchase of their lots. R. 953 at 59-61, 101-102, 183, 204-206; R. 954 at 18-19, 53-54.

36. When Clayton Warr approached Howard Crittenden about purchasing the quit claim deed, he offered to take Mr. Crittenden's horse trailer in lieu of the \$2500. The Crittendens were unable to sell the horse trailer to the Warrs because they had already sold it to their daughter. Lorelee Crittenden testified that her daughter purchased the horse trailer in 1995. R. 954 at 18-19.

37. When Hazel Warr informed Heidi Thomas that the water would cost \$2500, Heidi responded, “I'm a single Mom. I can't come up with \$2500. What am I going to do?” R. 953 at 183. She hung up and called Tonja Ruben. *Id.* Ms. Thomas placed this conversation in October of 1995. R. 953 at 182. When asked how she knew the date, Ms. Thomas replied that it was after her husband, Gary, had moved out in August of 1995. R. 953 at 182.

38. Fred Martinez was living in his home at the Rocky Top Subdivision when he received a phone call from Clayton Warr offering to sell him the quit claim deed to the water rights for \$5,000. Fred said "No way" and hung up the phone. Mr. Warr called back later and said the price would be \$2500. Again, Fred refused. R. 953 at 204-206. Karen Martinez testified that they moved into their home at the Rocky Top Subdivision in November of 1995. R. 954 at 12.

39. Wayne Reynolds, Melvin Spears, and Sandy Spears all testified that the Warrs first told them that they were going to have pay an additional \$2500 for the quit claim deeds in 1995. R. 953 at 59-60, 78; R. 954 at 53.

40. When the Plaintiffs protested that they had already paid for the water rights, the Warrs responded by telling them "You don't have anything in writing" and "bring on the lawyers". R. 953 at 183. The Warrs refused to deliver the deeds.⁷

41. On September 4, 1996 the Warrs filed with the State Engineer a request for yet another extension of time to prove the beneficial use of the water from October 31, 1996 to November, 1998. Trial Exh. 111. In support of this request, the Warrs represented the following, again in writing and under oath:

We are in the process of upgrading the "source" water line in order to use 100 percent of water rights. We need additional time to accomplish upgrading the source line (currently 4") to a new 12" line. The line is

⁷The deeds were actually prepared, and some were signed by the Warrs. Trial Exh. 80-83, 86, 90, 92. (Appellee's Supplemental Appendix at "A").

estimated to be approximately one mile in length requiring upgrade. The “place of use” water lines have been developed.

Id. This request for an extension was granted by the State Engineer. *Id.*

42. In 1997, Howard and Lorelee Crittenden sold Lot 10 of the Rocky Top Subdivision, together with the mobile home thereon, to Wayne and Miriam Lewis. Trial Exh. 119. The Crittendens made clear that they were not selling irrigation water with the property. Trial Exh. 115. However, their listing agent, Vonna Warr, told the Lewises that they could purchase irrigation water sufficient to irrigate five acres from the Warrs for a one-time fee of \$2500. R. 954 at 33. Mr. Lewis did not immediately purchase the water rights, because he lacked the money to do so. R. 954 at 37. He later learned that the Crittendens had purchased irrigation water with their purchase of Lot 10, but that it had not been delivered. R. 954 at 40. Accordingly, he did not purchase the irrigation water from the Warrs, but joined in this action. R. 954 at 40. In December of 1999, the Crittendens conveyed to the Lewises, by quit claim deed, any and all water rights which they had in association with Lot 10 of the Rocky Top Subdivision. Trial Exh. 131.

43. In September 1998, the Warrs filed an additional Request for Reinstatement and Extension of Time, seeking to extend the time for proving beneficial use of the water until October, 2002. Trial Exh. 124.

44. After the Warrs began trying to sell the quit claim deeds to the Plaintiffs, Howard Warr had a conversation with his father, Clayton Warr, regarding the irrigation water, in which he told his father “You can’t be double selling this water.” R. 953 at

151. Howard testified: “I was **arguing with him, asking him what his word was worth to him . . . and I was asking my dad what good was his word and telling him you couldn’t double sell this water. And his main comeback in all of it was, ‘they have nothing in writing.’”** *Id.*

45. To date, the Warrs have **failed and refused** either to convey to the **Plaintiffs** their water rights or to complete the delivery system from the Rose Spring to the Rocky Top Subdivision.

46. At trial, the Warrs’ expert witness, Mr. Vern Loveless, testified that .079 cfs is the amount of water the State Engineer’s office requires for the irrigation of four and three quarter acres of land. R. 954 at 169-170. Mr. Loveless further testified that, the amount of irrigation water Plaintiffs can draw from their culinary wells (.015 cfs), together with .079 cfs, would allow the irrigation of five acres of land. *Id.*

SUMMARY OF THE ARGUMENT

The trial court correctly determined, by “beyond a preponderance of the evidence” presented, that the Plaintiffs were entitled to the irrigation water they seek. R. 955 at 146. In so concluding, the court properly held that the doctrines of merger, the parol evidence rule, the statute of frauds, and the statute of limitations did not preclude such a result. The doctrine of merger is inapplicable in this case because the parties intended that the Warrs’ performance would not be complete upon the execution of a warranty deed. Rather, all parties intended, as **represented**, that the Warrs would convey to them

and deliver the water to the Subdivision at some point after the warranty deeds to the lots were provided. In addition, as the Warrs are quick to point out, the warranty deeds do not reference irrigation water. The water does not pertain to the same subject as does the deed. Thus, the doctrine of merger does not apply.

Moreover, the trial court did not err in determining that the parol evidence rule did not bar Plaintiffs' evidence or claims. On the question of whether a contract constituted a complete integration of the parties' understanding, all relevant evidence is admissible. The court did not err in allowing such evidence for that purpose. The trial court expressly found, as required, that the warranty deeds were *not* integrated. Having made that determination, it was not improper for the court to find, based upon the evidence, in favor of Plaintiffs. Further, the Warrs failed to marshal the evidence on whether the deeds constituted an integration of the parties' understanding, and thus have not adequately challenged the trial court's finding.

The trial court also properly held that the statute of frauds does not bar Plaintiffs' claims, due to the doctrine of part performance. In addition to acts of part performance by the Plaintiffs, the court cited "strong independent evidence" of the oral contracts, sufficient to satisfy the requirement of exclusive referability. The statute of frauds should not be made the means of perpetrating a fraud or gross injustice. In this case, as the court found, the compelling evidence demonstrates that application of the statute of frauds as a bar to Plaintiffs' claims would work just such a result. Again, the Warrs

failed to marshal the evidence supporting the trial court's findings as to acts of part performance by the Plaintiffs and strong independent evidence of the oral contracts.

The Warrs' statute of limitations argument also fails. The Warrs, by their words and conduct, misled the Plaintiffs into believing that they were trying to perform as agreed, such that legal action would not be merited. The evidence establishes that the Warrs did not manifest a disavowal of their obligation to provide and deliver the water until late in 1995. Under such circumstances, the trial court correctly concluded that the Plaintiffs acted within the statutory time frame once they became aware of their cause of action. Moreover, again the Warrs failed to marshal the evidence supporting the tolling of the statute, and therefore have not raised an adequate challenge to the trial court's decision.

Plaintiffs Wayne and Miriam Lewis are entitled to the relief awarded them. While the Lewises admittedly did not have a contract with the Warrs, they have a quit claim deed from the Crittendens, conveying to them any interest in the water to which the Crittendens were entitled by reason of their contract with the Warrs. The trial court properly rejected the Warrs' defense of lack of privity.

Finally, the amount of water awarded to the Plaintiffs is not excessive. The evidence demonstrates that the Plaintiffs were promised water sufficient to irrigate five acres. The only evidence in the record is that .079 cfs is that amount of water. Indeed,

the quit claim deeds the Warrs finally had prepared were to convey that amount to Plaintiffs. The trial court's decision should be upheld.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF MERGER.

The Warrs argue at length that the trial court erred by not excluding all evidence of dealings prior to the execution of the warranty deeds and by not finding that the Plaintiffs' claims are barred by the doctrine of merger.⁸ Appellant's Brief at 14-17.

⁸ As an initial matter, Plaintiffs note that the Warrs did not raise the doctrine of merger in their Motion to Dismiss, Motion for Summary Judgment, Trial Brief, or in the Pretrial Order. R. 68-96, 434-449, 591-607, 643-683, 684-709. Moreover, contrary to their assertion in their brief, they did not raise the doctrine of merger at the commencement of trial. *See, supra* at 4-5, fn. 3. The Warrs' motion to exclude the evidence of prior dealings on the first day of trial was made only under the parol evidence rule. While counsel did object at times during the trial that the oral representations had merged into the deeds, the "doctrine of merger" was never specifically mentioned until closing arguments. R. 953 at 34; R. 955 at 118-120. The trial court was presented with no legal authority or detailed discussion on the doctrine of merger until that point (when counsel referred the court, in passing, to one case on merger). R. 955 at 118-120. Under such circumstances, Plaintiffs question whether the issue was adequately raised to preserve the issue for appeal. As this Court has stated,

In a trial setting, to preserve an issue for appellate review, a party must first raise the issue in the trial court. That is, a trial court must be offered an opportunity to rule on an issue. A trial court has the opportunity to rule on an issue if the following three requirements are met: (1) "the issue must be raised in a timely fashion"; (2) "the issue must be specifically raised;" and (3) a party must introduce "supporting evidence or relevant legal authority."

Badger v. Brooklyn Canal Company, 966 P.2d 844, 847 (Utah 1998) (quoting *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah App. 1997) (other internal citations

The doctrine of merger is inapplicable in this case. As this Court has stated:

The doctrine of merger, which this Court **recognizes, is** applicable when the acts to be performed by the seller in a contract *relate only to the delivery of title to the buyer*. Execution and delivery of a deed by the seller then usually constitute full performance on his part, and his acceptance of the deed by the buyer manifests his acceptance of that performance even though the estate conveyed may differ from that promised in the antecedent agreement. Therefore, *in such a case*, the deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable.

However, if the original contract calls for performance by the seller of some act collateral to conveyance of title, his obligations with respect thereto survive the deed and are not extinguished by it. Whether the terms of the contract are collateral, or are part of the obligation to convey and therefore unenforceable after delivery of the deed, depends to a great extent on the intent of the parties with respect thereto. When the seller's performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller, absent some manifest intent to the contrary.

Stubbs v. Hemmert, 567 P.2d 168, 169-70 (Utah 1977) (emphasis added).

In *Dansie v. Hi-Country Estates Homeowners*, 987 P.2d 30 (Utah 1999), this Court reiterated the foregoing standard for the application of the merger doctrine, and

omitted). Plaintiffs question whether the doctrine of merger was *specifically* raised at any point prior to closing arguments, as well as whether it was *timely* raised, in the context of this case which had been briefed extensively and tried for three days before the doctrine of merger was mentioned in closing arguments.

stated that ““covenants related to title and encumbrances are not considered to be collateral *because they relate to the same subject matter as does the deed.*”” *Id.* at 35 (quoting *Secor v. Knight*, 716 P.2d 790, 792 (Utah 1986) (emphasis added)). In this case, there is no dispute that the warranty deeds make no mention of irrigation water. By definition, the contracts regarding the water do not “relate to the same subject matter as [do] the deed[s].” *Id.*

Applied to the instant case, it is clear that merger is inapplicable to the contracts to provide and deliver the irrigation water. The evidence at trial demonstrated that the Warrs and the Plaintiffs intended that the Warrs’ delivery of the water to the Subdivision would take place after the delivery of their deeds. The Warrs told the Plaintiffs that they would solve the problems with Bleazard and upgrade the pipeline such that the water could be delivered to the Subdivision. R. 953 at 173, 195; R. 954 at 29, 46-47, 50. All parties understood that this would take place after the delivery of the deeds. In the case of Wayne Reynolds, Hazel Warr made these assurances at the closing on his property. R. 954 at 50. Heidi Thomas was told by Clayton Warr that because of the Bleazard case, he couldn’t deliver the water at the time purchase, but that it would be provided and delivered thereafter. R. 173. Under such circumstances, “it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance on the part of the seller. . . .” *Dansie*, 987 P.2d at 35 (quoting *Stubbs v. Hemmert*, 567 P.2d 168, 169-70 (Utah 1977)).

The doctrine of merger simply does not apply to the **contracts to provide and deliver the water**. The Warrs' arguments on this point are therefore unavailing. The trial court did not err in finding that the doctrine of merger does not preclude the Plaintiffs' claims.

II. THE PAROL EVIDENCE RULE DOES NOT BAR PLAINTIFFS' CLAIMS.

The Warrs have asserted the parol evidence rule as a defense to Plaintiffs' claims, and contend that the trial court erred in not finding the evidence of the oral contracts barred by **that rule** at the commencement of trial. However, the parol evidence rule applies only where the parties have executed a writing **which** is intended to be a complete integration of their agreement. This Court has stated: "The parol evidence rule as a principle of contract interpretation has a very narrow application. Simply stated, the rule operates in the absence of fraud to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an *integrated contract*." *Union Bank v. Swenson*, 707 P.2d 663 (Utah 1985). "Therefore, a court must first determine whether the writing was intended by the parties to be an integration. In resolving this preliminary question of fact, parol evidence, indeed any relevant evidence, is admissible." *Id.*

The *Swenson* court further observed: "Protection against judicial enforcement of writings that appear to be binding integrations but in fact are not lies in the provision that all relevant evidence is admissible on the **threshold issue** of whether the writing was

adopted by the parties as an integration of their agreement. *This appears to be so even if the writing clearly states it to be a complete and final statement of the parties' agreement.*" *Id.* (emphasis added). See also, *Colonial Leasing Co. v. Larsen Brothers Construction*, 731 P.2d 483 (Utah 1986); *Bullfrog Marina, Inc. v. Lentz*, 501 P.2d 266 (Utah 1972). In this case, the trial court could not have determined, without hearing the evidence, whether or not the deeds were a complete integration of the understanding of the parties. It was not error to hear the relevant evidence and then make a finding that the deeds did not constitute a complete integration.

The evidence clearly supports the finding that the parties in this case did not intend the instruments of conveyance to be a complete integration of their agreements. Perhaps the best evidence of this is Plaintiff Wayne Reynolds' testimony that, at the closing on his property, the Warrs assured him that although they could not deed and deliver the water to him at that time, it would be provided as soon as the Bleazard litigation was resolved. R. 954 at 50. Likewise, Heidi Thomas testified that Clayton Warr expressly stated that since the Warrs were still trying to resolve the dispute with Bleazard, the water would not be provided immediately, but that there would be irrigation water once that dispute was settled. R. 173. In addition, as the trial court aptly noted, it is compelling that the Warrs' own children, who were also promised water, did not receive water rights in their warranty deeds, but instead were later given quit claim

deeds to the irrigation water (those deeds were prepared at roughly the same time as the deeds the Warrs attempted to sell to Plaintiffs). R. 953 at 145-146; R. 955 at 148.

Under these circumstances, it is clear that the parties did not intend the warranty deeds to be a complete integration of their agreements. Accordingly, the parol evidence rule does not apply. The trial court did not err in so concluding.

III. PLAINTIFFS' CLAIMS ARE NOT PRECLUDED BY THE STATUTE OF FRAUDS.

The Warrs next assert that the Plaintiffs' claims are barred by the Statute of Frauds, which generally requires that an agreement conveying an interest in land be in writing. *See* Utah Code Ann. § 25-1-1. This argument is also unavailing. As this Court has noted, “[t]he doctrine of part performance allows a court of equity to enforce an oral agreement, if it has been partially performed, notwithstanding the statute of frauds.” *Martin v. Scholl*, 678 P.2d 274 (Utah 1983). In establishing this doctrine, courts intended “to prevent [the statute of frauds from] being made the means of **perpetrating a fraud**” or gross inequity. *See Ravarino v. Price*, 260 P.2d 570, 578 (Utah 1953); *Welchman v. Wood*, 337 P.2d 410, 411 (Utah 1959). The trial court correctly determined that the doctrine applies in this case.

A performance or part performance is sufficient to satisfy the statute of frauds if the following elements are met:

First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be done in reliance on the contract. Such acts in reliance must be such that (a) they would not have been performed had the contract not existed [in other words, they must be exclusively referable to the contract] and (b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate.

Martin v. Scholl, 678 P.2d 274, 275 (Utah 1983).

The foregoing standard is easily met in the instant case. The terms of the oral agreement were clear and definite: in exchange for the Plaintiffs' payment of the purchase price of the lots, the Defendants would deliver sufficient water to irrigate five acres. Each Plaintiff paid the purchase price of his or her lot. Moreover, every Plaintiff, as well as the Crittendens, testified that he or she would not have purchased a five-acre lot without knowing where irrigation water would come from. R. 953 at 46, 62, 79, 103, 119, 184, 206; R. 954 at 14, 18, 30, 40, 56. As Heidi Thomas testified, "Gary was an old farm boy, and he knew the importance of water with the property." R. 953 at 184.

In addition, in reliance on the oral agreement, each Plaintiff made valuable improvements to the land. They built their homes on the lots, and Mel Spears, Fred Martinez, and Wayne Reynolds expended considerable time, effort, and money on installing a distribution pipeline so that the water could be delivered to their lots. The Plaintiffs would not have done so absent an agreement giving them rights to the water. Wayne Reynolds expressly stated that he would not have participated in installing the

pipeline **across** six lots if he had not understood that he owned **the water rights**. R. 954 at 52.

Even **assuming**, however, that the Plaintiffs' acts in reliance on the oral agreement were not exclusively referable to the oral contract, the statute of frauds would still be satisfied in this case. In *Roth v. Roth*, this Court stated:

[W]here the existence of the oral contract is established *by the admission of the party resisting specific performance or by competent evidence independent of the acts of part performance*, the requirement that the acts of part performance be exclusively referable to the oral contract is satisfied.

269 P.2d 278 (Utah 1954) (emphasis added). Similarly, in *Martin v. Scholl*, the Court stated:

[W]here the contract is admitted or [there are] strong independent acts which prove the contract exists, the requirement of exclusively referable acts has been relaxed . . . because the evidentiary concern is assuaged by either the admission or the independent acts. Consequently, *the more conclusive the direct proof of the contract, the less stringent the requirement of exclusively referable acts*.

678 P.2d 274, 277-78 (Utah 1983) (emphasis added).

In this case, the trial court properly found that, in addition to the Plaintiffs' acts in reliance on the agreement, there is independent evidence establishing the existence of the oral contracts, such that the "exclusively referable" requirement is satisfied. The Defendants' sworn affidavit in the 1988 Bleazard litigation admits the existence the oral contracts, stating: "We have sold six of the eleven lots in the Rocky Top Subdivision *upon our representation that gravity flow Water would be provided to such lots from our*

interest in the Rose Spring.” (Emphasis added). While the Warrs argue that the foregoing sworn statement does not *prove* the existence of the oral contracts, Plaintiffs submit that, at the very least, the affidavit provides strong independent evidence of the contracts.

But the affidavit is not the only independent evidence the trial court found probative of the oral contracts. The applications filed with the State Engineer’s office over a long period of time, signed and sworn to under oath by the Warrs, repeatedly reference the Defendants’ efforts to deliver the water from Rose Spring to the Rocky Top Subdivision.⁹ The Warrs’ representations to the Planning Commission also indicate their intent to develop the irrigation water in the Spring to be provided to lot purchasers. Finally, Howard Warr’s testimony established that the Warrs essentially admitted they had originally agreed to provide the water as part of the purchase price of the lots, but

⁹Taken together, the Warrs’ 1988 affidavit and their applications filed with the State Engineer’s office may well constitute a group of writings sufficient to satisfy the statute of frauds. Under the statute of frauds, “[t]he writing [or group of writings] need not be made as a memorandum of the contract, . . . nor must it be made contemporaneously with the formation of the contract.” *Richardson v. Schaub*, 796 P.2d 1304, 1310 (Wyo. 1990). In *Richardson*, a property report filed with a government agency which acknowledged a verbal agreement with another party was held to satisfy the statute of frauds. “When read in the context of the report,” the court reasoned, “this statement reasonably identifies the parties, the subject matter, and their obligations to each other.” *Id.* Likewise, the 1988 affidavit and documents filed with the State Engineer identify the parties as the Warrs and the owners of the lots, the subject matter as the water rights, and the Warrs’ obligation to provide the water. The statute of frauds simply does not preclude the enforcement of the Warrs’ oral agreement to provide the Water.

felt that was not important, since the Plaintiffs did not “have anything in writing.” R. 953 at 151-156. On this point, the trial court noted:

It seems to me the simplest thing to do would be to deny having said it rather than saying “we don’t have anything in writing.” The easy thing to say is “I did not ever tell you that you were getting—nor did anybody in my presence tell you—that you were getting irrigation water, and the written statements only confirm that.

That’s a whole lot different than saying “you have nothing in writing.”

R. 955 at 139-140. The court expressed the view that the Warrs’ mantra, “you have nothing in writing” was made to refute inconsistent oral representations. *Id.* at 139. Taken together, this independent evidence overwhelmingly satisfies the “exclusively referable” requirement of the part performance exception to the statute of frauds. In addition, the quit claim deeds prepared by the Warrs in Plaintiffs’ names are in themselves probative of the oral contracts. Trial Exh. 80, 81, 82, 83, 86. If the Warrs truly believed that they had only promised to make the water available for purchase, why would they have quit claim deeds prepared in the Plaintiffs’ names prior to even offering the water for sale? The trial court did not err in determining that the evidence showed acts of part performance and strong independent evidence of the oral contracts, such that the statute of frauds did not bar Plaintiffs’ claims.

Moreover, the Warrs failed to comply with their burden of marshaling the evidence on this point, and are therefore precluded from challenging this conclusion of the trial court. U. R. App. P. 24(9) (“A party challenging a fact finding must first

marshal all record evidence that supports the challenged finding). *See also Sampson v. Richins*, 770 P.2d 998, 1008 (Utah 1989); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987) (“To successfully appeal a trial court’s finding of fact,” the challenger must “fully assume the adversary’s position. In order to properly discharge the duty . . . , the challenger must present, in comprehensive and fastidious order, *every scrap of competent evidence introduced which supports the very findings the appellant resists.*”) (emphasis added).

A. HAZEL WARR IS LIABLE TO PLAINTIFFS UNDER PRINCIPLES OF AGENCY AND ESTOPPEL.

In an apparent attempt to bolster their statute of frauds argument, the Warrs have asserted that most of the Plaintiffs do not even allege that Hazel Warr promised to give them the water, but claim only to have received an oral promise from Clayton Warr, and then argue that the statute of frauds would nullify an otherwise enforceable promise by Clayton Warr to convey water rights, because the promise was not expressly reiterated by Hazel Warr. This argument is both factually and legally unfounded. First, the argument is based on a clear misrepresentation of the trial testimony of the Plaintiffs. Plaintiffs have testified that Hazel Warr was involved in the promises and representations made to them regarding water. R. 953 at 79-80, 195-196; R. 954 at 6-9, 27, 45-46, 50. Lora Lee Crittenden testified that Clayton and Hazel acted as “equal partners” in their dealings with the Crittendens. R. 954 at 27.

Even if the evidence did *not* show that Hazel Warr made promises to the Plaintiffs regarding the irrigation water, the Warrs' argument would fail. Nothing in the cases cited by the Warrs in support of their argument negates or supersedes the applicability of established principles of agency and estoppel, both of which subject Hazel Warr to liability.

1. Clayton Warr and Howard Warr were agents of Hazel Warr. Clayton Warr and Howard Warr each had both actual and apparent authority to act as an agent for Hazel Warr in connection with sales of lots in the Subdivision. Authority to act as an agent for another can be created by "manifestations of consent of the principal that the agent should act on account of the principal." Restatement of Agency (Second) § 7, comment a. Consent can be manifested by "words or other conduct, including acquiescence." *Id.* at comment c. Howard Warr's actions in selling lots, including representations with regard to the water, were clearly known of and approved by both his parents. R. 953 at 133. Hazel, on more than one occasion, heard her husband promising rights in the water to potential buyers. R. 953 at 79-80, 195-196; R. 954 at 6-9, 27, 45-46, 50. Hazel Warr, by her silence, manifested consent to the actions of Clayton Warr and Howard Warr with regard to sales of lots. Hazel Warr also testified that her husband acted on her behalf in selling the lots, because she was occupied tending her grandchildren. R. 954 at 73. She is now bound by the acts of her husband under agency principles.

In addition, by manifesting consent to potential buyers, Hazel Warr created apparent authority for her husband and her son Howard to act on her behalf. “Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person.” Restatement of Agency (Second) § 8. Hazel Warr was present on more than one occasion when Clayton Warr and/or Howard Warr were discussing lots and water rights with potential buyers; by remaining silent, she manifested her consent to their actions. Again, having known that the Plaintiffs believed that Clayton and Howard were acting as her agents, and allowing them to act on that belief, she is now bound by the actions taken by Clayton and Howard.

2. Because of her actions, Hazel Warr is estopped from arguing that she is not bound by promises made to the Plaintiffs by Clayton Warr.

A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

- (a) he intentionally or carelessly caused such belief, or
- (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.

Restatement of Agency (Second) § 8B. A “change in position” is defined to include payment of money and expenditure of labor. *Id.* A person is subject to liability if he or she “remained silent with knowledge that another was purporting to contract on [her] behalf.” *Id.*

In this case, the Plaintiffs “changed their positions because of their belief that the [promise to convey water rights] was entered into by” Hazel Warr. *See id.* Assuming for

the sake of argument that she never expressly promised to convey the water rights, she nevertheless “intentionally or carelessly caused such belief” by her silence regarding the representations and promises made to Plaintiffs, of which she was clearly aware. The trial court did not err in rejecting this argument by the Warrs. Moreover, again, the Warrs failed to marshal the evidence on this point, and therefore have not raised an adequate challenge to the finding. *See, e.g., Sampson v. Richins*, 770 P.2d 998, 1008 (Utah 1989); *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah App. 1998) .

IV. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Warrs also argue that the Plaintiffs’ claims are barred by the four-year statute of limitations for an action not founded on a written contract. *See Utah Code Ann. § 78-12-25*. However, the trial court correctly concluded otherwise. Under principles of equitable estoppel, the Warrs are precluded by their own conduct from asserting the statute of limitations as a defense. In addition, the Warrs failed to marshal the evidence on this point as well as others, and have therefore not adequately challenged the trial court’s finding. *See, e.g., Sampson v. Richins*, 770 P.2d 998, 1008 (Utah 1989); *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah App. 1998) .

1. The Statute of Limitations was Tolloed by the Warrs’ Misleading Conduct.

Utah courts have repeatedly held that a statute of limitations is tolled where the plaintiff does not become aware of the cause of action because of the defendant’s misleading conduct, or where “the case presents exceptional circumstances and the

application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.” *Envirotech Corp. v. Callahan*, 872 P.2d 487, 492 (Utah App. 1994). *See also Warren v. Provo City*, 838 P.2d 1125, 1129 (Utah 1992) (citing *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981); *Vincent v. Salt Lake County*, 583 P.2d 105, 107 (Utah 1978); *Rice v. Granite School Dist.*, 456 P.2d 159, 163 (Utah 1969)). The Plaintiffs submit that, under either of the foregoing theories, the statute of limitations was tolled in this case.

This Court has stated: “[A] defendant who misleads a plaintiff or causes delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action.” *Envirotech Corp. v. Callahan*, 872 P.2d 487, 493 (Utah 1994) (internal citations omitted). Applied to the instant case, it is clear that the Warrs are estopped from relying on the statute of limitations as a defense, due to their continual misrepresentations to the Plaintiffs regarding the water. Specifically, after conveying the deeds without the water rights, the Warrs continued to assure the Plaintiffs that the water would be provided as soon as delivery became possible. For a number of years after the Plaintiffs purchased their lots, the Warrs told them that the water could not yet be delivered because of the pending litigation with Bleazard and various problems with the pipeline. Thereafter, the Warrs represented that the deeds were being prepared. Throughout this time, the Warrs acknowledged their obligation to provide and deliver the water, and led the Plaintiffs to believe that they would do so as promised once the

ownership of the Spring was adjudicated and the delivery system was in place.

Once the Bleazard litigation concluded, the Warrs clearly manifested an intention to provide the water. They began working to solve problems connected with delivering the water. The Plaintiffs assisted them in this effort, contributing both time and money to the project. Several Plaintiffs joined together with the Warrs to purchase materials needed, rented a backhoe, and physically worked together to install a pipeline. They did so believing that their efforts would enable them to use the water to which they had already purchased the rights. During this time, the Warrs never indicated to the Plaintiffs that they did not intend to provide the water, or that the Plaintiffs would be charged an additional fee for the water.

In late 1995, the Warrs first informed the Plaintiffs that quit claim deeds had been prepared conveying the water rights as originally agreed. However, the Warrs now stated, for the very first time, that the Plaintiffs would have to pay an additional \$2,500 for the water rights, reasoning that they "had to make some money out of this." The Plaintiffs were understandably outraged, given that they had already paid for the water rights, and no prior mention of any additional charge for the water rights had ever been made. When the Plaintiffs declined to pay the additional \$2,500 for the quit claim deeds, the Warrs refused to deliver the deeds. This was the first time in all their years of dealing with the Plaintiffs that the Warrs expressly disavowed their obligations under their oral agreements with the Plaintiffs. Until this event in late 1995, the Warrs led the Plaintiffs

to believe that they would perform as agreed. Accordingly, the Plaintiffs' Complaint was filed well within the four-year statute. The trial court correctly determined that the Plaintiffs acted with "reasonable dispatch once they determined that remedies were really not going to [be] given to them as they had originally anticipated, and they did that within a timely fashion." R. 955 at 148.

2. *The Statute of Limitations was Tolled Under the Exceptional Circumstances Exception.*

Additionally, the evidence also shows that the statute of limitations was tolled in this case under the exceptional circumstances exception. Under that doctrine, the plaintiff must make an initial showing that he or she did not know, and could not reasonably have known, of the existence of the cause of action in time to file a claim within the time prescribed by statute. The court then engages in the following balancing test to determine whether the case presents exceptional circumstances: "Whether the hardship the statute of limitations would impose on the plaintiff in the circumstances of the case outweighs any prejudice to the defendant from difficulties of proof caused by the passage of time." *Warren v. Provo City Corp.*, 838 P.2d 1125 (Utah 1992).

In this case, before late 1995, the Plaintiffs could not reasonably have known that the Warrs would deny their contractual obligation to provide the water, given the Warrs' repeated representations that they intended to deliver the water. Further, the application of the balancing test set forth above clearly weighs in the Plaintiffs' favor. The trial court expressly found that the Warrs were not prejudiced by the passage of time in this case.

R. 955 at 150. By contrast, the hardship that the Plaintiffs will suffer if the statute of limitations is applied to bar their claim is substantial--they will be permanently deprived of valuable water rights for which they have paid, as well as the beneficial use of the five-acre lots they now own.¹⁰ For this additional reason, the statute of limitations was tolled. In short, due to the Warrs' conduct, the statute of limitations cannot equitably be raised as a valid defense to Plaintiffs' action. The trial court properly rejected this defense.

V. PLAINTIFFS WAYNE D. LEWIS AND MIRIAM LEWIS SUCCEEDED TO THE CLAIMS OF HOWARD A. CRITTENDEN AND LORA LEE CRITTENDEN.

The Warrs have argued that Plaintiffs Wayne and Miriam Lewis are not entitled to the irrigation water sold to the Crittendens, because they did not purchase their lot directly from the Warrs, and they were informed by a realtor at the time of purchase that they were receiving no water rights, but that they could purchase water rights from the Warrs for \$2500. The facts relied on by the Defendants are irrelevant. The Lewises received from the Crittendens and recorded a quit-claim deed conveying to the Lewises all the Crittendens' interest in the water rights originally promised to and paid for by the

¹⁰Plaintiff Wayne Reynolds would perhaps suffer the greatest hardship. Because of a moratorium on well drilling, he has been unable to build a home on his lot, and because he has no water, he cannot use his lot to grow any crops or raise game birds. Moreover, he cannot even sell his lot, since there is simply not a market for five acre desert lots with absolutely no water. Clearly, this case presents an exceptional circumstance, where the application of the statute of limitations would be irrational and unjust.

Crittendens. Trial Exh. 131. Accordingly, the claim for the water rights is now vested in the Lewises, and they are entitled to the irrigation water.

VI. THE JUDGMENT DOES NOT REQUIRE DEFENDANTS TO CONVEY AN EXCESSIVE AMOUNT OF WATER.

The Warrs' final argument is that the Judgment entered by the trial court requires them to convey an excessive amount of water. However, the only evidence in the record supports the Judgment. The record plainly established that Plaintiffs were promised sufficient water to irrigate five acres. The record also established that Plaintiffs (with the exception of Wayne Reynolds) are able to irrigate one quarter of an acre with their culinary wells. The Warrs' own expert witness, Mr. Vern Loveless, testified that using the calculations employed by the State Engineer's office, .079 cfs would irrigate four and three-quarter acres. R. 954 at 169-170, 182. Together with the Plaintiffs' rights to appropriate .015 cfs from their culinary wells and to irrigate one quarter of an acre with that water, the .079 cfs would give the Plaintiffs the amount of water the State Engineer's office allocates for the irrigation of five acres. This was the amount used in the first quit claim deeds in Plaintiffs' names (and in the names of the Warrs' children) prepared by Mr. Loveless at Hazel Warr's instructions. Trial Exh. 80, 81, 82, 83, 84, 85, 86, 87, 88. (Appellees' Supplemental Appendix at "A").

these reasons, the Plaintiffs respectfully request that the judgment in their favor be affirmed.

RESPECTFULLY SUBMITTED this 18 day of December, 2000.

JONES, WALDO, HOLBROOK &
McDONOUGH

By: Marci Rechtenbach

Anthony L. Rampton
Marci Rechtenbach
Attorneys for Plaintiffs

CONCLUSION

The evidence at trial and in the record clearly established that the Warrs entered into oral contracts with the Plaintiffs (and in the Lewises' case, the Crittendens) to provide the water as part of the purchase price of the lots. The Warrs themselves have testified in prior litigation that they represented that irrigation water would be provided with the lots they had sold. Notably, in that litigation, the Warrs' retaining the water appeared to depend in part upon the existence of the agreements with the Plaintiffs and other lot owners. The Warrs' present denial of their promises, together with their prior sworn testimony in the Bleazard case, and their representations to the Planning Commission and the State Engineer, make one fact abundantly clear: the Warrs will say whatever they deem necessary to hold on to this irrigation water.

It is noteworthy that the Warrs did not initially deny the existence of the oral contracts; they simply stated that the Plaintiffs didn't have "anything in writing." The Warrs have engaged in a blatant and deliberate attempt to use the statute of frauds and the statute of limitations to perpetuate a gross inequity, and these defenses should not be upheld by this Court. Likewise, the defenses of lack of privity of contract, the parol evidence rule, the doctrine of merger, and the laws of joint ownership do not provide a valid basis for the Warrs to escape enforcement of the contracts they made with the Plaintiffs. The Plaintiffs are entitled to receive the water rights, the conveyance and delivery of which are long overdue. The trial court did not err in so concluding. For

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2000, I caused to be ~~mailed~~ ^{hand-delivered},

postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEES** to
the following:

Denise A. Dragoo
Erik G. Davis
SNELL & WILMER

Mervin Rockendach

Addenda

Addendum 1

Recorded at Request of _____
at _____ M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

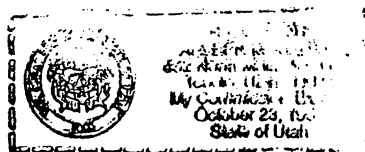
EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to MELVIN L. SPEARS AND SANDRA S. SPEARS grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of) Edward C. Warr
)
) Hazel V. Warr
)
)
)

STATE OF UTAH,)
) ss.
County of Tooele)



On the 23 of July, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

My commission expires Address:
10/23/94

Notary Public.

Allen M. Melia

EXHIBIT

80

WAR000142

Addendum 2

Recorded at Request of _____
at _____. M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to WAYNE V. REYNOLDS grantee of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of) _____
) _____
) _____
) _____
) _____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

EXHIBIT
81

WAR000144

Addendum 3

Recorded at Request of _____

at _____ M. Fee Paid \$ _____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to FREDDY MARTINEZ and KAREN MARTINEZ grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this __ day of _____, A. D. 1993

Signed in the presence of)	_____
)	_____
_____)	_____
)	_____
_____)	_____

STATE OF UTAH,)
) ss.
County of Tooele)

On the __ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

EXHIBIT
82

WAR000152

Addendum 4

WAR000143

Addendum 5

Recorded at Request of _____
at _____. M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to CATHY N. WARR JOHNSON grantee of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of)	_____
)	_____
_____)	_____
)	_____
_____)	_____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

EXHIBIT

Addendum 6

Recorded at Request of _____

at _____. M. Fee Paid \$ _____. _____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to CECIL B. JONES and TERESA M. JONES grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of) _____
) _____
) _____
) _____
) _____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

EXHIBIT

Addendum 7

Recorded at Request of _____
at _____. M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to CLIFFORD R. RUBEN and TOUJAM RUBEN grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of)	_____
)	_____
_____)	_____
)	_____
_____)	_____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

EXHIBIT

86

WAB000444

Addendum 8

Recorded at Request of _____
at _____. M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to EDWARD K. WARR and LISA G. WARR grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of) _____
) _____
) _____
) _____
) _____
) _____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

Addendum 9

Recorded at Request of _____
at _____. M. Fee Paid \$ _____.
by _____ Dep. Book _____ Page _____ Ref.: _____
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

EDWARD C. WARR and HAZEL V. WARR, grantors, of Tooele County, State of Utah, hereby QUIT-CLAIM to HOWARD A. WARR and LINDA Z. WARR grantees of Tooele County, State of Utah for the sum of TEN DOLLARS, the following described water rights in Tooele County, State of Utah:

Seven and nine tenths percent (7.9%) of Change Application No. a-12993 which represents 0.079 cfs from Rose Spring AKA Bryan Springs.

Witness the hand of said grantors, this ____ day of _____, A. D. 1993

Signed in the presence of)	_____
)	_____
_____)	_____
)	_____
_____)	_____

STATE OF UTAH,)
) ss.
County of Tooele)

On the ____ of _____, A. D. 1993, personally appeared before me EDWARD C. WARR and HAZEL V. WARR, the signers of the foregoing instrument, who duly acknowledge to me that they executed the same.

Notary Public.

My commission expires Address:

CONFLICTS RESPONSE SHEET

To: TCH / Conflicts Coordinator

Date: 11/28/00

From: Conflict Coordinator / File Room

Notice Number: TCH 11/28/00

Client: Jeffrey Knowles

The conflicts of interest computer check has been completed on the attached conflict e-mail. Please note the following:

- ☐ No conflicts were found
- ☒ Possible conflicts were found - See attached list

This engagement has been:

- ☒ Accepted*
- ☐ Determined no conflict exists, or
- ☐ Conflicts have been resolved
- ☐ Rejected, but we have acquired enough information that we may not be able to represent adverse parties. Retain these parties in the Conflicts database.
- ☐ Rejected. No need to maintain information in Conflicts database.
- ☐ Pending

*ATTENTION: Provide any additional related party names.



Attorney Signature / Date

PLEASE RETURN THE ATTACHED FORM

Note:

- If rejected, return this form to Conflicts coordinator
- If accepted, return originals to Conflicts coordinator and attach copy to new engagement and send to Billing Specialist

From: Conflicts2 (tch) (Conflicts)
To: All Attorneys; All Paralegals; Conflicts2
Date: Tue, Nov 28, 2000 11:40 AM
Subject: CONFLICT CHECK: INITIALS: TCH DATE: 11/28/00

<input checked="" type="checkbox"/>	Conflicts Checked
<input checked="" type="checkbox"/>	Conflict Response Sheet
<input checked="" type="checkbox"/>	Done
<input checked="" type="checkbox"/>	Data Entered
<input type="checkbox"/>	Accepted, Declined, Pending entered into Database

CLIENT: **JEFFREY KNOWLES** ✓✓
RELATED PARTY(IES):
PRIOR OR OTHER COUNSEL:
ADVERSE PARTY(IES): **THE RANCHES L.C.** ✓✓✓
ADVERSE RELATED PARTY(IES): **SCOTT KIRKLAND** and **STAN RICKS** ✓
ADVERSE PARTY ADDRESS:
OPPOSING FIRM:
OPPOSING ATTORNEY:
DESCRIPTION OF WORK: **REPRESENT CLIENT IN ACTION TO FORECLOSE ON TRUST DEED**
NOTE
SPECIAL CONSIDERATIONS:
QUALIFIES FOR NEW BUSINESS CREDIT? (YES OR NO):

Do NOT reply if you have no conflicts. If you DO have conflicts, please report them directly to the attorney whose initials appear in the subject line above. Do NOT reply to conflicts.

CC: All Secretaries

Conflicts Report

Notice Number	15847	Attorney	JER
Engagement Date	09/28/94	Completion Date	
Prior/Other Counsel		Archive Date	
Opposing Attorney		Opposing Firm	
Pending/Accepted	A	More Information to Follow	N
Comments	None known.		

Work Description File and pursue motion to dismiss lawsuits as time barred.

First Name	Last Name	Client Adverse Code	Related Party Code	Entity Type	SIC
Scott	Kirkland		c	ind	99
Christy	Kirkland		c	ind	99
George	Hermestroff		a	ind	99
Helen	Hermestroff		a	ind	99
Evelyne	Broitman		a	ind	99

Printed: 11/28/00

Page 1

Conflicts Report

Notice Number 100134
Engagement Date 10/13/92
Prior/Other Counsel
Opposing Attorney
Pending/Accepted a
Comments

Attorney
Completion Date
Archive Date
Opposing Firm
More Information to Follow n

Work Description collection

First Name	Last Name	Client Adverse Code	Related Party Code	Entity Type	SIC
	Holliday Affaire	unk	c	cor	99
Stan	Ricks	off	crp	ind	99
John	Jespersion	off	crp	ind	

Printed: 11/28/00

Page 1